HOSSEIN SHAHSAVANDI AHMAD v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
ABANG ISKANDAR JCA
[CRIMINAL APPEAL NO: B-05-78-03-2012]
10 JUNE 2015

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused person charged for trafficking drugs – Drugs found concealed in inner cover of shoes – Allegation that accused was told by another person to market shoes – Whether a fictitious character – Defence of innocent carrier – Whether probable – Accused person convicted for offence and sentenced to death – Whether conviction and sentence safe – Whether defence judicially appreciated – Dangerous Drugs Act 1952, s. 39B(1)(a)*

The appellant, an Iranian man, was stopped by the customs officer when he was making an exit at the Kuala Lumpur International Airport's arrival hall. The appellant's bag was scanned but nothing incriminating was found. During a body search conducted on the appellant, two packets containing white crystalline substances were discovered in the inner cover of the appellant's shoes. The substances were later confirmed by the chemist to be 439g of methamphetamine. The appellant was subsequently charged in the High Court for trafficking in dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). In his defence, the appellant denied knowledge of the drugs and contended that one 'Ali Reza' had asked him to bring the shoes to market in this region. At the end of the trial, the appellant was found guilty and was thus convicted for the offence and sentenced to death. Hence, the present appeal. The appellant argued that the trial judge had (i) committed a non-direction in that His Lordship wrongly assessed the facts of the defence case, resulting in miscarriage of justice against the appellant; (ii) failed to judicially appreciate the appellant's cautioned statement in which he had mentioned the name 'Ali Reza'; (iii) failed to consider the appellant's defence of innocent carrier; and (iv) failed to undertake a separate exercise as adverted to in the case of *Mohamad Radhi Yaacob v. PP*.

Held (dismissing appeal; affirming conviction and sentence of High Court)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) The trial judge had correctly assessed the evidence in its entirety and in His Lordship's conclusion that the prosecution had established a case against the appellant as per the charge. His Lordship had given the defence evidence the proper consideration that it deserved by referring to the salient features of the defence materials as adduced. If indeed the

A trial judge had erred, His Lordship erred in favour of the appellant by subjecting his defence to a lower burden of raising a reasonable doubt when in fact and in law, it was incumbent on the appellant to rebut the presumption of possession on the balance of probabilities. However, that error was one that was in favour of the appellant, thereby
B occasioning no substantial injustice to the appellant in any material way, which would otherwise have needed intervention in this appeal. (para 35)

(2) The appellant had only given the name of an alleged person known as 'Ali Reza' without more in the cautioned statement. That was not even
C his full name. No address was given to the recording officer. More importantly, no telephone number of this person was given by the appellant to the recording officer. Without the said number, the police would not be able to carry out further investigations. Surely, by just mentioning a name like 'Ali Reza' and expecting the police to launch a
D search for him in Teheran, if not the entire Iran, would be most unreasonable in any circumstance. (paras 9 & 13)

(3) The appellant was not an innocent carrier. 'Ali Reza' had not been admitted to by the prosecution as a real person. Neither had the appellant shown him as a real person or created a reasonable doubt as
E to his existence. The appellant's information on him was sketchy and was a figment of the appellant's imagination. The trial judge was satisfied that 'Ali Reza' was a fictitious character which was conveniently created by the appellant to escape from the charge. In such circumstances, there was no further duty on the trial judge to determine
F whether Ali Reza was the real trafficker. (paras 23 & 25)

(4) Not all cases involving trafficking require a separate exercise. It would depend on what kind of defence had been furnished by the accused person. There was no need for the trial judge to undertake a 'separate exercise' as enunciated in *Mohamad Radhi*'s case. The trial judge had not
G erred in the manner that His Lordship had directed his mind on trafficking when he considered the defence case in light of the law as well as the overall totality of the evidence that was adduced. (paras 21 & 22)

Bahasa Malaysia *Translation Of Headnotes*

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Perayu, seorang lelaki warganegara Iran, telah ditahan oleh pegawai kastam ketika sedang keluar dari balai ketibaan Lapangan Terbang Kuala Lumpur. Beg perayu diimbas tetapi tiada apa-apa barang yang disyaki dijumpai. Semasa pemeriksaan ke atas badan dilakukan terhadap perayu, dua
I bungkusan berisi bahan putih kristal ditemui dalam tapak kasut perayu. Bahan tersebut disahkan oleh ahli kimia sebagai 439g methamphetamine. Perayu dituduh di Mahkamah Tinggi kerana mengedar dadah berbahaya,

satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya ('ADB'). Dalam pembelaannya, perayu menafikan pengetahuan mengenai dadah tersebut dan menyatakan bahawa seorang yang bernama 'Ali Reza' telah memintanya agar membawa kasut tersebut untuk dipasarkan di rantau ini. Di penutup bicara, perayu didapati bersalah dan disabitkan atas kesalahan serta dijatuhkan hukuman mati. Oleh itu, rayuan ini. Perayu menghujahkan bahawa hakim bicara telah (i) tersalah arah dalam mana Yang Arif terkhilaf dalam menilai fakta kes pembelaan, menyebabkan ketidakadilan terhadap perayu; (ii) gagal mempertimbangkan secara kehakiman pernyataan beramaran perayu di mana perayu menyebut nama 'Ali Reza'; (iii) gagal mempertimbangkan pembelaan pembawa tidak bersalah perayu; dan (iv) gagal mengguna pakai langkah berasingan seperti yang diketengahkan dalam kes *Mohamad Radhi Yaacob v. PP*.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman Mahkamah Tinggi)

Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara telah dengan tepat menilai keseluruhan keterangan dan dalam kesimpulan beliau bahawa pihak pendakwaan telah membuktikan kes terhadap perayu seperti yang dipertuduhkan. Beliau telah memberi pertimbangan wajar terhadap keterangan pembelaan seperti yang sepatutnya dengan merujuk kepada ciri-ciri penting material pertimbangan yang dikemukakan. Sekiranya hakim bicara terkhilaf, beliau terkhilaf dalam memihak kepada perayu dengan memberikan pembelaannya satu beban yang lebih rendah untuk membangkitkan anggapan milikan atas imbangan kebarangkalian. Walau bagaimanapun, kekhilafan tersebut dibuat berpihak kepada perayu, lantaran itu tidak menyebabkan ketidakadilan besar terhadap perayu dalam apa-apa jua cara, yang mana akan, sebaliknya, memerlukan campurtangan dalam rayuan ini.

(2) Perayu sekadar memberikan nama orang yang didakwa dikenali sebagai 'Ali Reza' tanpa memberikan maklumat lebih dalam pernyataan beramarannya. Itu bukanlah nama penuhnya. Alamat tidak diberikan kepada pegawai yang mencatat. Lebih penting lagi, nombor telefon orang ini tidak diberikan oleh perayu kepada pegawai yang mencatat. Tanpa nombor telefon tersebut, pihak polis tidak boleh menjalankan siasatan lanjut. Sudah tentu hanya dengan menyebut nama seperti 'Ali Reza' dan mengharapkan pihak polis memulakan carian ke atasnya di Teheran, jika tidak seluruh Iran, adalah amat tidak munasabah dalam apa-apa jua keadaan.

(3) Perayu bukanlah pembawa tidak bersalah. 'Ali Reza' tidak dikemukakan oleh pihak pendakwaan sebagai orang yang wujud. Perayu juga tidak membuktikan bahawa dia wujud atau membangkitkan

keraguan munasabah mengenai kewujudannya. Maklumat perayu mengenainya tidak lengkap dan merupakan satu khayalan imaginasi perayu. Hakim bicara telah berpuas hati bahawa 'Ali Reza' adalah watak sesuai yang direka untuk meloloskan diri daripada pertuduhan. Dalam hal keadaan sedemikian, hakim bicara tidak mempunyai tugas lanjut untuk menentukan sama ada Ali Reza adalah pengedar sebenar.

(4) Tidak semua kes melibatkan pengedaran memerlukan langkah berasingan. Ia bergantung kepada apakah pembelaan yang dikemukakan oleh si tertuduh. Tiada keperluan untuk hakim bicara mengambil langkah berbeza seperti yang termaktub dalam kes *Mohamad Radhi*. Hakim bicara tidak terkhilaf dalam mengarahkan minda beliau kepada pengedaran semasa beliau mempertimbangkan kes pembelaan bersandarkan undang-undang dan juga keseluruhan keterangan yang dikemukakan.

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Ganapathy Rengasamy v. PP [1998] 2 CLJ 1 FC ***(refd)***
Ghasem Gharezadehsharbiani Hassan v. PP [2014] 1 LNS 752 CA ***(refd)***
Jamuna Chaudhary & Ors v. State of Bihar [1974] 3 Supreme Court Cases 774 ***(refd)***
Lim Hock Boon v. PP [2007] 4 CLJ 114 ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Mraz v. The Queen [1953] 93 CLR 493 ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 37(d)
Prevention of Corruption Act 1961, ss. 4(a), 14

For the appellant - Foong Kitson; M/s Kit & Assocs
For the respondent - Nurshafini Mustafha; DPP

[Editor's note: For the High Court judgment, please see PP lwn. Hossein Shahsavandi Ahmad [2012] 1 LNS 1385 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Abang Iskandar JCA:

Brief Facts Of The Case

[1] On 10 July 2011 while on his supervisory duty at International Arrival Hall, Royal Customs Officer PiK Mokhadinil Akma Mokhtar (PW4) had stopped an Iranian man who was then exiting through the green lane. The Iranian man was asked to scan his bag (P30) under the supervision of PiKK Elangovan Rethnesamy (PW5). However nothing incriminating was detected

in the bag. Thereafter, PW4 and PW5 brought the Iranian man to Cawangan Pemeriksaan Penumpang (CPP1) where PW5 had conducted a body check on him. PW5 proceeded to examine his shoes (P15- right and P22- left). When PW5 opened the inner cover (pelapik) of the shoes which was sealed by gum he found two packets containing white crystalline substances, in each shoe. The white crystalline substances were suspected to be dangerous drugs. All the packets containing the white crystalline substances suspected drugs were then seized from the Iranian man. They were subsequently sent to the chemistry department for analysis and the chemist, Maimonah Sulaiman (PW3), had confirmed the white crystalline substances to contain 439g methamphetamine, a dangerous drug as listed in the First Schedule of the Dangerous Drugs Act 1952.

[2] Upon due completion of the investigations, the Iranian man, now identified as Hossein Shahsavandi Ahmad ('Hossein') was charged in the High Court of Shah Alam on the following charge, as follows:

> Bahawa kamu pada 10.7.2011 jam lebih kurang 11 pagi di Cawangan Pemeriksaan Penumpang 1 (CPPA 1), Balai Ketibaan Antarabangsa, Terminal Utama Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam Daerah Sepang, dalam Negeri Selangor Darul Ehsan, telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 439 gram, dan oleh yang demikian kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[3] After a full trial, the learned High Court Judge had found Hossein guilty of the charge and had sentenced him to the death penalty. Hossein had since appealed to this court and we had heard his appeal on 25 August 2014.

The Appeal

[4] The appellant Hossein had filed into court his petition of appeal as well as his written submissions. We had sight of both. Before us, his learned defence counsel Mr Kitson Foong had indicated to us that he would focus on three issues, namely (1) that there was non-direction committed by the learned trial judge in that he had wrongly assessed the facts of the defence case, thereby resulting in miscarriage of justice against Hossein (see ground four in the written submission); (2) that there was a failure by the learned trial judge to judicially appreciate the defence of Hossein objectively; and (3) that the learned trial judge had failed to consider as a separate exercise whether Hossein had rebutted the presumption of possession.

[5] It was clear to us that the thrust of the appeal was directed at how the learned trial judge had managed the defence of Hossein in the totality of the whole case. It was also our view that the issues as articulated by Mr Foong could be dealt with and be considered together as to do that would be more comprehensive than to consider the three issues separately, as the issues were inter-related and inter-twined to one another. Definitely they were not mutually exclusive.

A **[6]** It had come quite clearly to us that the defence of Hossein had primarily centred on the existence of one man allegedly named "Ali Reza". According to Hossein, it was Ali Reza who had asked him to bring the shoes to market in this region. It was his contention that he did not know that the said shoes that he was wearing when he was arrested had contained the B impugned drugs.

[7] Thus the attack by Mr Foong on the possession element against Hossein was understandable. There cannot, in law, be possession with the necessary *mens rea* without the attendant guilty knowledge on his part on the existence of the drugs inside the pair of shoes (P15 and P22) that he was C wearing. He had no such knowledge and that only Ali Reza in Teheran, Iran could give account on the existence of the said drugs found inside the said shoes that Hossein was wearing on the fateful day when he was arrested at KLIA.

[8] It was submitted before us that Hossein had given the name "Ali Reza" D right at the time when he was arrested at the KLIA. According to him, he had also given the name "Ali Reza" to the police during the recording of his cautioned statement. We were referred to the cautioned statement appearing at p. 239 record of appeal. In particular, we were referred to question 9 at p. 240 therein. The matter of "Ali Reza" was not referred to the investigating E officer (SP6). As such, it was urged upon us that it was wrong to regard "Ali Reza" as an afterthought. This matter regarding Ali Reza was also adverted to in the evidence of SD2 and SD3 during the defence case. These witnesses had brought with them documents D49, D50 and D51 which according to Mr Foong were not challenged by the prosecution during cross-examination. F But it must be noted that the learned trial judge had rejected those documents as they were not the originals of the documents that were tendered. This was recorded at p. 171 of the record of appeal.

[9] We had occasion to look at the cautioned statement of Hossein that was given to the recording officer. We did see the name "Ali Reza" in that G cautioned statement as submitted by Mr Foong. But there were no other particulars in the cautioned statement pertaining to this person that could have assisted the police to pursue a useful investigation into tracing who this person was and determining whether he was a real person or a figment of Hossein's imagination. It would be only reasonable to expect Hossein to H furnish a better and fuller particularisation of this so-called "Ali Reza", bearing in mind that he was a person who purportedly was living in Iran. Surely by just mentioning a name like "Ali Reza" and expecting the police to launch a search for him throughout the length and breadth of Teheran, if not the entire Iran, would be most unreasonable in any circumstance.

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[10] To our mind, in order to enable the police to initiate investigations into the existence of a person named to the police by an accused person, the information so furnished must be sufficient in the circumstances. Particulars on his full name and address would feature as top priority. Telephone number would definitely help. At least, the information given ought to be able to help police to make a basic profile on the person so-named.

[11] The case of *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705 would readily come to mind in situation like this. Indeed, that *Alcontara*'s case *(supra)* was cited in the *Ghasem Gharezadehsharbiani Hassan v. PP* [2014] 1 LNS 752 which admittedly was a drug trafficking case. The relevant factual matrix of that case, to our mind, could be appreciated in the passages which we would advert to in a moment.

[12] We would be referring to paras. 17 and 18 of the *Gharezadehsharbiani*'s case *(supra)* to illustrate the point. The point being, how the *Alcontara* notice ought to work in favour of the accused person.

> [17] There is another reason why we took the view that the appellant's conviction was unsafe. It will be recalled that it was his defence that he had no knowledge at all about the drugs found hidden inside the bag as he was merely carrying the bag for a person by the name of Masoud. As we have said earlier, in his cautioned statement, the appellant at a very early stage of the investigation had furnished Masoud's telephone number to the investigating officer. That being the case, the onus was on the prosecution to check whether the appellant's version of the facts, as they appeared in his cautioned statement, was true or false (see: *Alcontara a/l Ambross Anthony v. PP* [1996] 1 CLJ 705). In this regard, the investigating officer, Muhamad Ilyas Queek Abdullah ("PW6") conceded the importance of the telephone number in order to disprove the appellant's version. This is what PW6 said in his evidence:
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> > Dalam D37: OKT ada beri nombor telefon Masoud. Saya tak telefon Masoud menggunakan nombor telefon itu. Nombor telefon itu penting kerana saya dapat pasti Masoud wujud dan apa OKT kata betul atau tidak.
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> [18] In spite of the importance of the telephone number, PW6 never investigated on Masoud. PW6 did not even make a call to the number given by the appellant on the excuse that 'saya terlepas pandang'. In our view, the conduct of PW6 is most unsatisfactory and unacceptable. As an investigating officer, PW6 has an onerous responsibility to investigate all aspects and fairly, including feature of the case which not only favours the prosecution but also the appellant. The duty of the investigating officer is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction but to bring out the real unvarnished truth (see: *Jamuna Chaudhary & Ors v. State of Bihar* [1974] 3 Supreme Court Cases 774). The appellant cannot be penalized for lack of ingenuity in investigation by PW6 depriving him of the time honoured benefit of doubt (see: *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ

A Rep 265; [1992] 1 MLJ 137). This was never considered by the learned trial judge. Consequently, the appellant's right to a fair trial has been compromised, which has the effect of rendering the conviction very unsafe. The appellant may thereby have lost a chance which was fairly opened to him of being acquitted and that there had been occasioned a failure or a miscarriage of justice (see: *Mraz v. Queen* [1955] 93 CLR 493 B quoted with approval in *Lim Hock Boon v. PP* [2007] 4 CLJ 114; [2007] 1 MLJ 46)."

[13] Now, looking at the circumstances that had featured in that *Gharezadehsharbiani*'s case *(supra)* and those obtaining in our instant appeal, it is clear to our mind that in our present case, Hossein had just given only C the name of an alleged person named as "Ali Reza", without more. That was not even his full name. No address was given to the recording officer. More importantly, no telephone number of this person was given by Hossein to the recording officer. The significance of furnishing a telephone number cannot be over-emphasised. Without that number, how could further investigations D be carried out by the police? Therein lies the crucial difference between the two cases. It will not count for much even though the name of "Ali Reza" had been given early on in the investigations, such as during recording of cautioned statement, as in this case, if Hossein did not furnish further useful information about "Ali Reza" which could assist further investigations by the E police. The fact that this "Ali Reza" was supposed to reside in Teheran in Iran did not escape our consideration. It would be very difficult indeed for the police to begin further investigation based on that single piece of information given by Hossein.

[14] So, on the matter of investigation pertaining to D48, on Ali Reza, F *Gharezadehsharbiani'*s case *(supra)* can be distinguished on some material features, in particular as follows: In that case the name "Massoud" was given by the accused to the police; The telephone number of "Massoud" was also given to the police; and the evidence whereby the investigating officer in that case showed that the investigating officer had admitted to the importance of G the information in order to verify the existence of "Massoud". Of course, the investigating officer did not take any action to verify that very important factual suggestion by the accused. In such circumstance, we could understand fully the approach that was taken by the court in that *Gharezadehsharbiani*'s case *(supra)* in acquitting the accused person at the end of the appeal, as was clearly reflected in para. 18 of the grounds of decision. H

[15] But, having said that, we were not able to come to the same decision that was arrived at in the *Gharezadehsharbiani*'s case *(supra)* simply on the ground that apart from giving the name "Ali Reza" to the recording officer, Hossein did not give any other pertinent information that could be used as I a platform from which the police could have launched into further investigations in order to verify the existence of "Ali Reza". In such a

circumstance, we were of the view that no blame could be assigned to the police for not pursuing the verification of "Ali Reza". The sheer lack of information on "Ali Reza" given to the police had not therefore cast any duty on the police to verify the existence of "Ali Reza". As such, there was no instance of unfair investigation being perpetrated on Hossein. We therefore saw no merits in the complaint on the matter of investigations that was raised by learned counsel before us, on behalf of Hossein.

[16] Learned counsel for Hossein had also complained to us that the learned trial judge had failed to undertake a separate exercise that was adverted to in the case of *Mohamad Radhi Yaacob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311. Before we proceeded further to consider this point, we should reproduce *in extenso* how this point was articulated on behalf of Hossein. We could do no better than to quote from the relevant paragraph in the written submissions of learned counsel, which appeared at p. 2 therein. The relevant paragraph had been para. 2, which had read as follows:

> 2. Yang Arif Hakim Yang Bijaksana terkhilaf dari segi undang-undang dan fakta apabila gagal membuat penemuan bahawa Perayu telah berjaya mematahkan anggapan statutory s. 37(d) Akta Dadah Berbahaya 1952 atas keimbangan-kebarangkalian 'as a separate exercise' pada peringkat akhir kes pendakwaan DAN pada peringkat akhir kes pembelaan.
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> Justeru itu, kegagalan Yang Arif Hakim Perbicaraan Yang Bijaksana untuk mengguna-pakai prinsip perundangan kes *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 (perenggan (d), di ms. 316) yang memutuskan:
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> it is incumbent for the court to consider whether on a balance of probability in the evidence the defence has rebutted the statutory presumption of trafficking under s. 37(da) as a separate exercise even though the court is satisfied on balance that the presumption of possession under s. 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.
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> adalah satu 'material misdirection' yang menjejaskan sabitan terhadap perayu.

[17] Now, we had occasion to refer to the cited case of *Mohamad Radhi Yaakob (supra)*. It had occurred to us that in fact, the paragraph that was cited by learned counsel as appeared in para. 2 of his written submissions was, with respect, incomplete. In fact, the cited para. 3 had begun with the phrase, "Unless the evidence in a particular case does not obviously so warrant," which to our mind is a huge qualifier to the rest of the said paragraph that was cited to us by learned counsel to support his legal proposition.

[18] The effect of such a qualifier clearly would mean that it is not in all cases involving drug trafficking that the trial judge must undertake the "separate exercise" as was adverted to by learned Justice Mohd Azmi in the

Mohamad Radhi's case *(supra)*. What the relevant paragraph in the *Mohamad Radhi*'s case means to say, to our mind, is that it would be wrong, in law, on the part of the trial judge to simply proceed to convict an accused person facing a trafficking charge for the offence of trafficking just because the accused person has failed to rebut the presumption of possession that operated against him or that the accused has failed to raise a reasonable doubt as regards the *factum* of possession, at the end of the defence case. That has been the mischief which the apex court in the *Mohamad Radhi*'s case *(supra)* had sought to address so as to enable the trial court to properly direct its mind on the attendant legal issues before it at the end of the whole case. To reiterate that point, we would now quote what the Supreme Court in *Mohamad Radhi*'s case had held in held (4), as follows:

> The learned trial judge has acted on the wrong premise that once the appellant had failed to rebut the presumption under s. 37(d) of the Act, the presumption under s. 37(da) of the Act had also not been rebutted.

[19] This, to our mind, is of critical consideration because under the Dangerous Drugs Act 1952, having unlawful possession of a dangerous drug is an offence in itself. Likewise is the offence of trafficking. These two offences are distinct from each other and each is separate from the other, whereby different elements are required to be proven by the prosecution before a conviction may be obtained against an accused person so charged. So, it is a fallacy to rule at the end of the defence case that just because the accused person has failed to exonerate himself from the element of possession, then he must also *ipso facto* be guilty of trafficking as well, without the trial judge having to further consider the evidence whether the trafficking offence has been answered by the accused for which his defence has been called. So, whether a separate exercise ought to be undertaken by the trial judge must depend on how the defence has been erected and articulated before the trial court.

[20] With respect, that, to our mind was the intended effect of the opening phrase in held para. 3 in the *Mohamad Radhi*'s case *(supra)*. In light of the decision in the apex court in the case of *Balachandran v. PP* [2005] 1 CLJ 85, if no evidence is offered to answer to the charge, the accused person must be convicted. By the accused person not leading any evidence on the element of trafficking, is tantamount to not answering to the charge of trafficking. The consequences can only be dire against the accused person so charged.

[21] So, to recap, not all cases involving trafficking require a separate exercise. It depends on what kind of defence has been furnished by the accused person. Based on the factual matrix of this case, we are of the respectful view that there was no need for the learned trial judge to undertake "a separate exercise" as enunciated in the *Mohamad Radhi*'s case *(supra)*. But upon due perusal of the grounds of decision of the learned trial judge, we

found that he had in fact gone on to making a separate finding on the issue of trafficking. This we had noted at p. 174 of the record of proceedings, vol. 2 as follows:

> Tidak ketinggalan ialah pendapat Mahkamah bahawa perbuatan OKT terang- terangan telah membawa dadah tersorok dalam kuantiti yang banyak yang tidak memungkinkan ia untuk kegunaan sendiri OKT. Ia dibawa dalam dan melalui penerbangan ke Malaysia dan dengan itu menyokong penemuan bahawa OKT membawa dadah Methamphetamine untuk tujuan pengedaran (seksyen 2, Akta Dadah Berbahaya 1952). OKT bukanlah seorang pengedar (pembawa) pasif tetapi aktif.

[22] So, with regard to the issue of separate exercise as enunciated in the *Mohamad Radhi*'s case *(supra)*, it was our considered view that the learned trial judge had not erred in the manner that he had directed his mind on trafficking when he considered the defence case in light of the law as well as the overall totality of the evidence that was adduced before him. As such, we had found no merits in the contention advanced by Mr Foong on behalf of his client, Hossein.

[23] It was also submitted before us that the trial judge was also wrong in not concluding that Hossein was an innocent carrier. This issue had close nexus with the issue of Ali Reza, which we had adverted to earlier in our judgment. Learned counsel had referred to the case of *Ganapathy Rengasamy v. Public Prosecutor* [1998] 2 CLJ 1; [1998] 2 MLJ 577. Suffice for us to state here that in that case of *Ganapathy Rengasamy (supra)* the existence of one Abdul Rahman bin Noh alias Ah Kiong was an undisputed fact. Indeed, he had been admitted by the prosecution to have been arrested for a different drug offence. In short, Ah Kiong was not a fictitious person. He had existed. In our present appeal, Ali Reza had not been admitted to by the prosecution as a real person. Neither had Hossein shown him as a real person or created a reasonable doubt as to his existence. Hossein's information on him was sketchy and the evidence of SD2 and SD3 had been rejected by the learned trial judge. The documentary evidence was hearsay and not properly attested to as required under our legal system. In short Ali Reza was a figment of Hossein's imagination.

[24] In this regard, we would with respect advert to the same case of *Mohamad Radhi (supra)* where the so-called *Radhi*'s direction was articulated by learned Justice Mohd Azmi SCJ and which was subsequently explained with great clarity as to its application in the case of *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773 in appreciating the true effect of the case of *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311. This court in *Yee Wen Chin*'s case *(supra)* had said:

> That case (*Mohamad Radhi v. PP (supra)*) is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two

A separate exercises must be carried out by the trial Judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the Judge must then determine whether that other person is the real trafficker. This is called the *Radhi* direction and must be administered by a court unto itself when such a B defence is taken. See, *Sochima Okoye v. Public Prosecutor* [1995] 3 CLJ 371 CA.

[25] It was clear to our mind that the learned trial judge was satisfied that Ali Reza was a fictitious person which was conveniently created by Hossein to escape from the charge. On the evidence as adduced before him, we were C of the view that the trial judge was correct in his finding. In such a circumstance, there was no further duty on his part to determine whether Ali Reza was the real trafficker. That duty, identified as the second limb in the *Radhi*'s direction did not arise in the circumstances obtaining in this case. That, to our mind must put paid to Hossein's complaint on the innocent D carrier issue. We agreed with the learned trial judge that Hossein was not an innocent carrier of the drugs that were found under the internal soles of the pair of Adidas shoes that he was wearing when he was arrested at KLIA on the fateful day referred to in the charge that was subsequently preferred against him.

E **[26]** Having said that, it did not escape our notice that the learned trial judge had concluded in the following manner when he concluded that Hossein ought to be convicted as the prosecution had proven its case against him beyond reasonable doubt and that at the same time that Hossein had failed to raise a reasonable doubt in the prosecution case. We would F reproduce that was found by the learned trial judge at p. 16, records of appeal as follows:

17. Dengan yang demikian, di peringkat akhir kes pembelaan, Mahkamah membuat keputusan bahawa pihak pendakwaan telah berjaya membuktikan kesnya melampaui apa-apa keraguan munasabah, dan G dalam hal yang sama, pihak pembelaan telah gagal membangkitkan suatu keraguan yang munasabah ke atas kes pihak pendakwaan.

[27] We noted earlier on at pp. 174-175 of records of appeal, the learned trial judge had ruled that he was employing the test in *Mat v. Public Prosecutor* [1963] 1 LNS 82; [1963] 1 MLJ 263. He then went on to state that:

H Mahkamah ini tidak dapat menerima dan mempercayai pembelaan OKT.

[28] Then, he concluded that Hossein had failed to raise a reasonable doubt in the prosecution's case, as was seen in para. 17 of his grounds of decision at p. 175 appeal record.

I

[29] It must be noted that this case had involved the use of legal presumption against the accused/appellant. In particular, in this case, the judge had invoked the presumption of possession under s. 37(d) of the DDA 1952 against Hossein. This finding by the learned trial judge can be seen at p. 152, record of appeal, vol. 2, as follows:

> OKT ditangkap sememangnya semasa ada dalam kawalan dan milikan ke atas P15 dan P22. Di bawah seksyen 37(d), Akta Dadah Berbahaya 1952 dia adalah "deemed to have in his possession of the drug and to have known the nature of such drug **until the contrary is proved**." (emphasis added.)

[30] We agreed with the learned trial judge on his finding and invocation of the presumption of possession under s. 37(d) of the DDA 1952 against Hossein. But, having said that, the presumption so invoked, must be rebutted by the accused person. How this presumption operates is that the *factum* of possession is presumed "until the contrary is proved". In other words, the accused is required by law to show proof that he is not in possession of the drugs as preferred in the charge. When a presumption operates against an accused person, it becomes incumbent on the accused person to rebut that presumption by leading evidence and that presumption can only be rebutted on the balance of probabilities. That much is clear as can be seen in the Privy Council decision in the case of *Public Prosecutor v. Yuvaraj* [1968] 1 LNS 116 which has since been followed religiously by our courts as to the attendant burden of proof on the accused person in rebutting a legal presumption that operates against him. In that *Yuvaraj*'s case *(supra)* the Privy Council, was posed with the following question involving a prosecution under s. 4(a) of the Prevention of Corruption Act 1961 and the invocation of a presumption under s. 14 of the same Act. The question was postulated in the following manner for their Lordships' consideration:

> Whether in a prosecution under s. 4(a) of the Prevention of Corruption Act. 1961, a presumption of corruption having been raised under s. 14 of the said Act, the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable or whether that burden can only be rebutted by proof that the defence is on such fact (or facts) the existence of which is so probable that a prudent man would act on the supposition that it exists. (s. 3 Evidence Ordinance)

[31] In answering that question, their Lordships through the speech of Lord Diplock had opined that this appeal turns solely upon the construction of these words "unless the contrary is proved." As to be recalled, that phrase "unless the contrary is proved" also existed in the presumption provisions under s. 37(d) of the DDA 1952 which this appeal before us now is concerned with. At the end of their analysis of the postulated question, their Lordships had concluded as follows:

> In the result upon the true construction of the Evidence Ordinance and the Prevention of Corruption Act 1961, there is, in their Lordships' view, no relevant difference between the two descriptions of the burden of

A rebutting the presumption of corruption which are contained in the question reserved for the consideration of the Federal Court, if the expression in the first part of the question: "the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable" **is understood as meaning "the burden of rebutting such presumption is discharged if the Court considers that on the balance of**
B **probabilities** the gratification was not paid or given and received corruptly as an inducement or reward as mentioned in s. 3 or 4 of the Prevention of Corruption Act 1961. (emphasis added)

[32] Indeed in the then Supreme Court case of *Mohd Radhi Yaakob (supra)* that legal proposition was reiterated and given great clarity by learned Justice
C Mohd Azmi, in the following words, like so when it held among others:

[2] Where the prosecution relies on available statutory presumptions to prove one or more of the essential ingredients of the charge, *the particular burden of proof, as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is*
D *heavier than the burden of casting a reasonable doubt* but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. (emphasis added)

[33] It is therefore clear that there is a difference in terms of the ultimate effect of invoking a legal presumption against an accused person. From the
E speech of learned Justice Mohd Azmi (SCJ) in the *Mohamad Radhi*'s case *(supra)* the existence of the three different burdens of proof in a criminal proceeding, namely (i) raising a reasonable doubt; (ii) proving beyond a reasonable doubt; and (iii) rebutting on the balance of probabilities and their respective effect cannot be more clear. The person against whom a legal
F presumption is invoked bears a heavier burden to discharge in order to be acquitted of an offence. It is incumbent on such an accused person to rebut the presumption on the balance of probabilities. Where no such legal burden operates against an accused person, he only needs to raise a reasonable doubt on the prosecution case and in law he is entitled to an acquittal. So, in a
G prosecution whereby a legal presumption is in operation against the accused person, the consideration to be undertaken by the trial court, so trite following *Mat v. PP (supra)* is clearly not sufficient. It has become clear that where a legal presumption needs to be rebutted by the accused person, the whole dynamics pertaining to the issue of burden of proof incumbent on the accused person to rebut has dramatically changed, in that, such rebuttal can
H only be achieved by the accused doing so on the balance of probabilities. It is not sufficient in law, for the accused person just to raise a reasonable doubt in order to secure his acquittal where a legal presumption applies against him.

I **[34]** Having said that, although the learned trial judge had erred in not applying the correct principle when assessing the defence case where the presumption of possession was in play against Hossein, it must be stressed

that he had erred in favour of the accused person in this case, in that he had subjected the accused person's defence to a lighter burden than the one on the balance of probabilities. As such, his error had not substantially prejudiced Hossein, the appellant before us. His error therefore had no substantial bearing or impact at all, on the conviction that was entered against Hossein. The question that we had asked ourselves had been, if on the lower threshold of raising a reasonable doubt Hossein had failed to discharge that burden, would he have been able to discharge an even higher burden of rebutting the operative presumed possession on the balance of probabilities? To this question, we were unanimous in answering the question in the "negative".

[35] As such, we were satisfied that the learned trial judge had correctly assessed the evidence in its entirety and in his conclusion that the prosecution had established the case against Hossein as per the charge. He had given the defence evidence the proper consideration that it deserved by referring to the salient features of the defence materials as adduced before him. If indeed he had erred, he erred in favour of Hossein by subjecting his defence to a lower burden of raising a reasonable doubt when in fact and in law, it was incumbent on Hossein to rebut the presumption of possession on the balance of probabilities. But as we had said earlier, that error was one that was in favour of Hossein, thereby occasioning no substantial injustice to Hossein in any material way, which would otherwise have needed our curial intervention in this appeal.

[36] Premised on the above, we had dismissed this appeal by Hossein. Our decision was unanimous. The conviction and sentence that were imposed by the learned trial judge against Hossein were therefore affirmed.